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No. 90-1390

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GENERAL MOTORS CORPORATION, *Petitioner*

v.

EVERT ROMEIN, ET AL., *Respondents*

FORD MOTOR COMPANY, *Petitioner*

v.

ARTURO GONZALEZ, ET AL., *Respondents*

On Petition For A Writ Of Certiorari To The Supreme Court Of Michigan

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondents have not refuted petitioners' description of the confusing state of the law with respect to Contract Clause and Due Process limitations on retroactive legislation. Rather they have sought to persuade the Court that the facts of this case are so unique that the Court need not bother paying attention to the Michigan Supreme Court's decision.[1] The facts of this case are indeed somewhat unique—never before has a court upheld a legislature's massive imposition of retroactive liability designed solely to reverse an earlier (now politically unpopular) legislature's enactment. But the extreme character of the Michigan court's decision does not make this case any less appropriate a candidate for certiorari; for the Contract Clause and Due Process issues that the Michigan court decided are recurring ones that continue to confuse and divide the many lower courts that address them.

The Michigan Supreme Court's decision cannot be shrugged off as an aberration; it is a typical example of the cavalier manner in which some courts have treated the bedrock prohibitions against impairments of contract and retroactive legislation. By granting certiorari in this case, the Court will not only be able to settle a number of important conflicts among the lower courts, but will also have the opportunity to remind the courts and legis-

[1] In light of respondents' efforts to portray coordination as some draconian measure that deprives employees of their entitlements, it is worth noting that respondents continue to receive their income-replacement benefits from petitioners; all they are being deprived of is their right to double recovery. The principle of coordination is the approach endorsed by the National Commission on State Workmen's Compensation Laws. See 4 *Larson's Workmen's Compensation Law* app. G 607, 616 (1989); see also 4 *Larson's Workmen's Compensation Law* § 97.10 (an employee experiencing wage-loss due to three separate conditions—physical disability, economic unemployment, and old age—is still only experiencing one wage-loss and should not be allowed to recover three sets of benefits simultaneously); *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) (ERISA preempts state laws prohibiting coordination of benefits).

latures of the nation that the Contract Clause and Due Process Clause are not dead letters, and that distinct limitations on retroactive legislation—limitations that the Framers of the Constitution thought to be of paramount significance in the constitutional scheme—continue to exist.

I. THE APPLICABILITY OF THE CONTRACT CLAUSE

Respondents do not dispute the fact that state and federal courts throughout the country have reached dramatically divergent results on the question of whether workers' compensation schemes create rights protected by the Contract Clause. Instead, they first assert that this issue is inappropriate for review because the Michigan Supreme Court's holding on this point was an alternative one. Romein Opp. 15. But far from making this an inappropriate decision for this Court to review, the fact that the Michigan Supreme Court also held, in the alternative, that the 1987 statute could withstand Contract Clause scrutiny strongly supports a grant of certiorari. As petitioners have demonstrated, both of the issues presented here—the applicability of the Contract Clause to workers' compensation schemes and the proper application of this Court's Contract Clause cases to retroactive impairments of private agreements—cry out for this Court's review. The Michigan Supreme Court's dual holdings will give this Court the opportunity to address both of these issues, each of which is independently worthy of review.[2]

[2] Of course, if the Court, upon granting review, were to hold that the Contract Clause does not apply to workers' compensation schemes, it would have no need to go on to address the proper application of the Contract Clause (although the Due Process issue would remain alive). But, even in that unlikely event, the Court will have settled a conflict that has created a substantial split among many federal and state courts. Alternatively, if the Court were to hold that the Contract Clause does apply, it would then have the opportunity to review the Michigan Court's erroneous application of that Clause.

Respondents' second contention is that the question of whether a State's workers' compensation statute creates interests protected under the Contract Clause is not a question of federal law, "but, rather, a question of state law which each State is free to answer for itself." Romein Opp. 16 n.16; see also State Opp. 13-15. This claim, for which respondents offer no support, is blatantly inconsistent with what this Court and the lower federal courts have continuously declared about the Contract Clause: "[the Supreme] Court has frequently instructed that *federal courts must independently determine* the existence of a contract and the nature and extent of its obligations in order to decide whether it enjoys the protection of the Contract Clause." *Pineman* v. *Oechslin*, 637 F.2d 601, 604 (2d Cir. 1981) (emphasis added). In *Coombes* v. *Getz*, 285 U.S. 434, 441 (1932), for example, the Court explained:

> The decision of the supreme court of a state construing and applying its own constitution and laws generally is binding upon this court; but that is not so where the contract clause of the Federal Constitution is involved. In that case this court will give careful and respectful consideration and all due weight to the adjudication of the state court, but will determine independently thereof whether there be a contract, the obligation of which is within the protection of the contract clause, and whether that obligation has been impaired; and, likewise, will determine for itself the meaning and application of state constitutional or statutory provisions said to create the contract or by which it is asserted an impairment has been effected. *Scott* v. *McNeal*, 154 U.S. 34, 45; *Mobile & Ohio R. Co.* v. *Tennessee*, 153 U.S. 486, 492 *et seq.*; *Stearns* v. *Minnesota*, 179 U.S. 223, 232-233; *Louisiana Ry. & Nav. Co.* v. *New Orleans*, 235 U.S. 164, 170; *Huntington* v. *Attrill*, 146 U.S. 657, 684; *New Orleans Waterworks* v. *La. Sugar Rfg. Co.*, 125 U.S. 18, 38; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 144; *Jefferson Branch Bank* v. *Skelly*, 1 Black 436, 443.

Accord *Irving Trust Co.* v. *Day*, 314 U.S. 556, 561 (1942) ("the existence of the contract and the nature and extent

of its obligation become federal questions for the purposes of determining whether they are within the scope and meaning of the Federal Constitution"); see generally *State of Nevada Employees Ass'n* v. *Keating*, 903 F.2d 1223, 1227 (9th Cir. 1990) ("Federal law, not Nevada law, controls whether the state statutes at issue create contractual rights protected by the contract clause"). It is plain, then, that the split among the courts that petitioners have described (Pet. 11-14) presents a significant *federal* question, and not simply "a matter of state law about which the states are free to differ." Romein Opp. 16 n.16.[3]

II. THE REQUIREMENTS OF THE CONTRACT CLAUSE

Respondents' reaction to our demonstration that the Michigan Supreme Court's application of the Contract Clause was overly casual and in tension with this Court's and other courts' decisions is to repeatedly parrot the Michigan Court's anomalous conclusion that the $25 million impairment of petitioners' interests "cannot be deemed a substantial one." Romein Opp. 11-14. However, neither the quotation itself, nor the reasons advanced in its support, comes close to rebutting petitioners' claim that the Michigan Court's decision was unfaithful to the Contract Clause. And perhaps even more significantly, neither of the respondents has even attempted to challenge petitioners' demonstration that the lower federal and state courts

[3] Moreover, the Michigan Supreme Court's holding that the Contract Clause does not apply to workers' compensation issues is starkly inconsistent with its long line of holdings, in related contexts, that the workers' compensation statute does become part of the employment contract. See Pet. 13 n.4 (citing cases). There is strong reason for concern, then, that the state court is attempting to "evade the restraint of the [Contract] Clause by determining, through legislation or adjudication, that an arrangement previously regarded as a contract was no longer [contractual]." *Pineman*, 637 F.2d at 604.

have reached irreconcilable results on these issues, and that this Court's guidance is sorely needed.

In support of their claim that there was no substantial impairment here, respondents argue that petitioners had no legitimate right to rely on the 1981 enactment that allowed prospective coordination of all payments for future disability periods. By asserting that petitioners coordinated benefits at their peril, respondents seek to divert the Court's attention from the fact that the Michigan Supreme Court *unanimously* held that the plain language and legislative intent of the 1981 statute allowed employers to begin coordinating payments for all disability periods beginning after March 31, 1982. See *Franks* v. *White Pine Copper Div.*, and *Chambers* v. *General Motors Corp.*, reported together at 375 N.W.2d 715 (Mich. 1985). Given this authoritative construction of the 1981 statute, it is difficult to comprehend how respondents can continue to assert that petitioners were unjustified in coordinating benefits pursuant to the 1981 statute.[4]

Respondents further attempt to minimize the substantiality of the impairment to petitioners' interests by asserting that petitioners are taking a position here that is inconsistent with the judgment they benefited from in *Franks* and *Chambers*, where the Michigan Supreme Court rejected the employees' argument that the Constitution

[4] Respondents seek to make the 1981 statute seem unreasonable by pointing out that it allowed the coordination of benefits of some employees who had not received any increase in their benefit levels through a separate 1980 enactment. This argument is premised on a false nexus between the 1980 enactment that increased the benefits of some employees and the unrelated 1981 enactment that instituted coordination. Respondents offer no evidence that these measures were linked in any way, and the Michigan Supreme Court found no such linkage when it issued its decisions in *Franks* and *Chambers*. By characterizing these two distinct legislative measures as "[t]he 1980-81 legislative package" (Romein Opp. at 3), respondents seek to imply with rhetoric what they cannot support with fact.

forbids coordination of future benefits for those injured prior to the 1981 statute's effective date. This argument is fundamentally flawed, however, because it confuses the well-accepted state power to *prospectively* adjust payments (the issue involved in *Chambers*) and the until now unheard-of power to *retrospectively* enhance an employers' obligations for past, closed payment periods.

It was this precise dichotomy that was involved in the companion Michigan Supreme Court cases of *Franks* and *Chambers*. In *Chambers*, the court held that the legislature could constitutionally provide for coordination of benefits for all future benefit periods. 375 N.W.2d at 722-723. In *Franks*, by contrast, the court held that the 1981 statute did not allow employers to coordinate benefits for payment periods that had already closed, and that such a statute would be a retrospective impairment of rights. 375 N.W.2d at 730-731. This distinction is, of course, in keeping with the nature of the workers' compensation contract which requires employers to pay employees the amounts that the legislature has declared due as each new payment period arrives. See generally *id.* at 730 (unlike the situation in *Chambers*, "application of § 358 to alter liability for benefits due and payable prior to its effective date does constitute retrospectivity").

Consistent with this distinction, petitioners have never challenged the constitutionality of the 1987 statute as it relates to payment periods commencing after its effective date. Nor have petitioners challenged the general prospective increases in benefit levels that the legislature has enacted through the years. Petitioners do not question the legislature's authority to prospectively modify benefit levels for future disability periods. Such modifications can take the form of prospective increases in employer liability (as in the case of the prospective portions of the 1987 amendment) or prospective decreases in employer liability (as in the case of the prospective application of the 1981 amendment). The workers' compensation payments involved

in these cases compensate employees for each new period that they remain disabled, not for their underlying injuries. Thus, as long as legislative changes affect only future periods, they are not subject to attack as retroactive impairments of obligations.

Indeed, it is hard to believe that respondents are serious when they claim that the legislature is as free to retrospectively reopen past claim periods as it is to modify benefit levels for future disability periods. For if that were the case, then the legislature would not only be entitled to *increase* retroactively payments for closed periods as it has sought to do here, but would also be entitled to *decrease* retroactively employee payments for closed periods. For example, a legislature faced with the need to make concessions to in-state employers could declare that disability payments have been too generous over the past five years, and that employers are entitled to withhold payments to employees until such "overpayments" are recouped. Indeed, perhaps the legislature could even require the employees to return the now-declared "overpaid" amounts with interest, as employers are being forced to do under the 1987 amendment at issue here. This is obviously a ridiculous result which neither respondents nor the courts should ever be expected to support. But these results are the necessary consequence of respondents' failure to distinguish between prohibited retroactive and permissible prospective changes in workers' compensation benefit levels.[5]

III. THE REQUIREMENTS OF THE DUE PROCESS CLAUSE

Instead of confronting petitioners' claim that the Michigan court's decision upholding five years of retroactive

[5] See also Brief of *Amici Curiae* Michigan Association of Insurance Companies, *et al.*, at 8-19 (discussing amendment's effect on insurance contracts).

benefit increases is out of step with the decisions of many courts throughout the country, respondents have sought to hide behind the Michigan court's conclusory pronouncements on the Due Process Clause. As we demonstrated in our petition (at 25-28), however, the Due Process Clause requires a level of inquiry into retroactive laws that was wholly absent from the Michigan court's approach here.

For example, the Michigan Supreme Court and respondents suggest that petitioners' reliance interest was diminished here because the 1987 amendment overruling *Franks* and *Chambers* was "entirely foreseeable." Romein Opp. 21 n.21. Yet neither the court nor any of the respondents point to even one example—in Michigan or elsewhere—where a legislature has required an employer to reopen closed periods and increase payments to employees who already received full payments in accordance with law in effect during their disability period. See Pet. App. 52a (Griffin, J., dissenting) ("prior to the majority's decision today, this Court never recognized or sanctioned a legislative attempt to overrule retroactively a decision of this Court"). It may have been foreseeable that the legislature would *prospectively* change the 1981 statute, but no one could have anticipated the oppressive and unprecedented *retroactive* scheme that the Michigan legislature incorporated into the 1987 statute during the final days before its passage.[6]

Similarly, respondents continue to insist that petitioners have not relied in any way on the 1981 statute. In our petition we explained how the level of anticipated workers' compensation liabilities is one of the factors considered when labor and management negotiate their collective bargaining agreements. See Pet. 15; see also *id.* at 12 n.3 (terms of workers' compensation laws are often modified by collective bargaining agreements). But quite aside from the effect that the statute had on petitioners' bargaining positions (which certainly qualifies as substantial reliance), the 1981 statute and the *Franks-Chambers* decisions allowed petitioners to begin coordination without seeking a judgment against individual employees. See *Chambers*, 375 N.W.2d at 726. Relying on that statute and those decisions, petitioners began coordinating benefits without going through the ministerial process of obtaining a judgment in each case. Yet, the Michigan Supreme Court has now declared that only those employers who obtained judgments are immune from the retroactive aspects of the 1987 amendment. See Pet. App. 14a. Obviously, petitioners would "have altered their course of conduct" (Pet. App. 8a) had they known about the 1987 amendment: they would have sought and easily obtained a judgment allowing them to coordinate benefits for each employee.[7]

Lower federal and state courts have struggled to interpret the somewhat contradictory messages that this Court has sent with respect to due process limitation on retroactive legislation. The *Romein* and *Gonzalez* cases are not, therefore, simply important opportunities for this Court to rectify a misapplication of the United States Constitution. They are also appropriate and timely vehicles for the Court to provide meaningful guidance on what limits the Due Process Clause places on purely retroactive legislation.

[6] See generally Brief of *Amicus Curiae* Michigan Self-Insurers' Association at 4-6. It bears repeating that the "entirely foreseeable" retroactive portion of the 1987 amendment was not even added to the legislation until eight days before its final passage. See Pet. 16 n.5.

[7] See also Brief of *Amici Curiae* National Association of Manufacturers, *et al.* (describing industry reliance).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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